

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES RICHARD HARBISON,

Defendant-Appellant.

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UNPUBLISHED

October 24, 2006

No. 261727

Emmet Circuit Court

LC No. 04-002336-FC

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529. After being sentenced as a second habitual offender, MCL 769.10, to concurrent terms of 10 to 25 years' imprisonment, he filed this appeal as of right. We affirm defendant's convictions, but remand for resentencing.

Defendant conspired with a friend, David Lockhart, to rob the gas station where Lockhart worked. Lockhart testified that defendant arrived at the gas station as planned, wielding a baseball bat and demanding money. Defendant, who was dressed in dark clothes and wearing a ski mask, used the bat to smash security cameras and other items in the store. He then took the money from Lockhart and another cashier, who knew nothing of the agreement. Defendant fled the scene after forcing Lockhart and the other cashier into a restroom.

On appeal, defendant first argues that the prosecutor committed misconduct and violated his right to a fair trial by referring to defendant's closing arguments as "red herrings."

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586, 592-593; 629 NW2d 411 (2001). However, defendant failed to object to any of the "red herring" comments; therefore, our review is for plain error affecting defendant's substantial rights, i.e., a showing of prejudice. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, even where it is determined that plain error occurred affecting a defendant's substantial rights, this Court must exercise its discretion and only reverse the conviction when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

Here, there was no plain error and, assuming plain error, it did not affect defendant's substantial rights, nor was defendant actually innocent or the fairness of the judicial proceedings called into question; there was overwhelming evidence of defendant's guilt. The prosecutor's comments simply reflected an attempt to counter or criticize defense counsel's focus on testimony that was not ultimately pertinent with respect to the commission of the conspiracy and robbery when viewed in light of the relevant, damaging testimony showing guilt, which evidence was emphasized by the prosecutor in support of his "red herring" comments. Furthermore, the prosecutor clearly and repeatedly reminded the jurors that it was their role to decide the importance of any testimony or piece of evidence. While the prosecutor's comments might have suggested that defense counsel was trying to distract the jury from the truth, the comments were properly made in response to defense counsel's suggestion that the prosecutor failed to recognize evidence that was allegedly problematic to the prosecution's theory. See *Watson*, *supra* at 592-593 (similarly rejecting a defendant's claim that reversal was warranted on the basis of "red herring" statements made by the prosecutor). Moreover, if the prosecutor's comments crossed the line, any prejudicial effect could have been cured by a timely instruction, and therefore, reversal is unwarranted. *Id.* at 586. The prosecutor's designation of defense counsel's arguments as "red herrings" did not generate the type of accusatory prejudice decried in *People v Dalessandro*, 165 Mich App 569, 579; 419 NW2d 609 (1988). Therefore, defendant's reliance on *Dalessandro* is misplaced. Reversal is unwarranted.

Defendant next argues that the trial court erred by scoring ten points with respect to offense variable nine (OV 9), MCL 777.39. We agree.

Resentencing is justified when it prevents the imposition of a sentence that is invalid due to a misapplication or misunderstanding of the law. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002), *aff'd* 468 Mich 50; 658 NW2d 154 (2003). Issues concerning the proper application of the statutory guidelines are reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). MCL 769.34(10) allows for remand and resentencing when a scoring error occurred.

With regard to OV 9, MCL 777.39(1)(c) requires the court to score ten points where there are two to nine victims of the offense. A "victim" is a "person who was placed in danger of injury or loss of life[.]" MCL 777.39(2)(a). Relying on *People v Knowles*, 256 Mich App 53; 662 NW2d 824 (2003), the trial court explicitly stated that it was considering the gas station as a victim for purposes of scoring OV 9 because the station suffered a financial injury. If the gas station is not considered a victim under OV 9, the proper score for OV 9 would have been zero points, resulting in a change in the offense variable level to level I and a new minimum sentencing range of 51 to 106 months' imprisonment; defendant's current minimum sentence is 120 months, which is within the currently scored guidelines range of 81 to 168 months. MCL 777.62 (grid for class A crimes) and MCL 777.21 (habitual offender effect on grid).

The trial court erred in determining that the gas station was a victim under OV 9. This Court recently held that a business that suffers financial injury does not constitute a "victim" under OV 9 because the variable's language regarding victims only applies where there exists a

danger of physical injury. *People v Melton*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 257036, issued July 20, 2006), overruling *Knowles*, *supra*, pursuant to MCR 7.215(J) (special panel conflict resolution). Hence, the trial court erred in scoring ten points for OV 9 instead of zero.<sup>1</sup> Because this error impacts the minimum sentencing range, resentencing is warranted.

Defendant's convictions are affirmed, but the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Michael R. Smolenski

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<sup>1</sup> In all fairness to the trial court, the "error" arises only because *Melton* overruled *Knowles*, which was the controlling case when the court sentenced defendant. The trial court's ruling was consistent with *Knowles*.